# Petition

81-650

Office - Supreme Court, U.S.
FILED
OCT 2 1981
ALEXANDER L. STEVAS.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. _____

ALEXANDER KULIK,

PETITIONER,

-vs-

STATE OF CALFIORNIA,

RESPONDENT,

PETITION FOR WRIT OF CERTIORARI

PHILIP A. DeMASSA
Attorney at Law
2150 First Avenue
San Diego, California 92101
Telephone: (714) 236-0897

Attorney for Petitioner
ALEXANDER KULIK

## QUESTIONS PRESENTED FOR REVIEW

1. When an individual expresses a privacy interest in the contents of a bag by telling a police officer not to search it, does the officer have the right to ignore the assertion of the Fourth Amendment and undertake a search?
2. What is the reasonable scope of the custodial responaibility of the police where the decision to impound a vehicle is discretionary?

## INDEX


| | Page |
|---|---|
| Questions Presented for Review | i |
| Table of Cases | iii |
| Opinion Below | 2 |
| Jurisdiction | 3 |
| Constitutional Provision at Issue | 3 |
| Statement of the Case | 4 |
| Reasons for Granting the Writ | 15 |
| Conclusion | 33 |
| Appendix "A" - Opinion of the California Supreme Court May 14, 1981 | |

## TABLE OF CASES


| | Page |
|---|---|
| Arkansas v. Sanders, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979) | 18, 21 |
| Bumper v. North Carolina, 391 U.S. 543, 88 S.Ct. 1798, 20 L.Ed.2d 797 (1968) | 24 |
| Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925) | 25 |
| Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970) | 25 |
| Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969) | 26 |
| Collidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971) | 26 |
| Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) | 16 |

Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) 22

New York v. Belton, ___ U.S. ____, 101 S.Ct. 2860, ____ L.Ed. ____ (1981) 27, 28

Preston v. United States, 376 U.S. 364, 84 S.Ct. 881, 11 L.Ed.2d 777 (1964) 27

Robbins v. California, ____U.S.____, 101 S.Ct. 2831, ____ L.Ed.2d____ (1981) 18, 19, 20

South Dakota v. Opperman, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976) 28, 29

United States v. Chadwick, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977) 18

Statutes:

28 U.S.C. §1257 3
28 U.S.C. §2101 3

Penal Code §647(f) 7

Vehicle Code §22651 10

2 LaFave, Search and Seizure: A Treatise on the Fourth Amendment 559 (1978) 31

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. _____

ALEXANDER KULIK,

PETITIONER,

-vs-

STATE OF CALIFORNIA,

RESPONDENT,

PETITION FOR WRIT OF CERTIORARI

Petitioner, Alexander Kulik, prays that a writ of certiorari issue to review the opinion of the California Supreme Court entered August 6, 1981.

## OPINION BELOW

The California Supreme Court entered its unpublished decision, No. 4 Crim. 10520, on August 6, 1981. A copy of the opinion is attached as Appendix "A".

## JURISDICTION

This court's jurisdiction is invoked under 28 U.S.C. §§1257 and 2101, this being a petition arising out of a state criminal conviction. The petition is filed within 60 days of denial of petitioner's petition for hearing by the California Supreme Court on August 6, 1981.

## CONSTITUTIONAL PROVISION AT ISSUE

Amendment IV:

> The right of the people to be secure in their persons, house, papers and effects, against unreasonable search and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

## STATEMENT OF THE CASE [1]

At 12:50 p.m. on October 22, 1977, Orange County Deputy Sheriff Robert Giles was dispatched via his patrol unit's radio to a Safeway supermarket in Mission Viego to look for a drunk in a Stutz Blackhawk sedan.

When Deputy Giles arrived on the scene, he observed a Stutz Blackhawk sedan parked in a marked parking space in the center of the private lot adjacent to the Safeway and several small businesses. He pulled up behind the vehicle and parked.

As Deputy Giles walked to the driver's side of the Stutz, he observed petitioner

---

1/ The Statement of the Case is adopted from the opinion of the California Court of Appeal, attached as Appendix "A" hereto. However, where significant facts were necessary to be included, petitioner has made additions and cited the Motion to Suppress Transcript as "M.T.", which are part of the record on appeal in case 4 Crim. 12089, currently pending before Fourth District Court of Appeal, Division Two. The Reporter's Transcript is cited herein as "R.T.".

seated in the driver's seat with his head on the steering wheel. When Giles tapped several times on the closed window with his knuckles, petitioner sat upright and looked about for several seconds. Petitioner's hair was disheveled and his clothes were wrinkled.

Deputy Giles tapped on the window again and told petitioner to roll it down. Petitioner turned around, looked toward the officer, and complied with his request. Giles observed that petitioner was sweating heavily and he had a brown substance smeared around his mouth. He smelled of a musty odor. When Giles asked petitioner if he was all right, petitioner replied that he was. Petitioner's hands were on the steering wheel and Giles observed there was a dark or dirty substance underneath his finger nails and around the cuticle of those finger nails.

Deputy Giles asked petitioner for identification. Petitioner opened a wallet, looked through it, closed it up and stated he did not have any. The deputy had

observed papers in the wallet. When asked if he had a driver's license, petitioner took a piece of paper he identified as his birth certificate out of the wallet and handed it to Deputy Giles. This paper was a Nevada birth certificate for an Anthony William Kaiser, born March 21, 1950.

After Deputy Giles had asked petitioner if he were Anthony Kaiser and received an affirmative response, the officer asked petitioner for his birthdate and his age. Petitioner stated he was born on March 27, 1947, and was 27 years old. He hesitated a moment and then said he was 29.

Deputy Giles asked petitioner for the Stutz' registration or other proof of ownership. Petitioner replied that he did not have any because it was a leased car. Deputy Giles testified that petitioner spoke very slowly, that his speech was slurred and that he would begin to answer questions in a normal tone of voice and then trail off until he could barely be heard. When petitioner looked at Deputy Giles and tried to concentrate, his eyes would close.

Deputy Giles asked petitioner to get out of the Stutz because Giles suspected petitioner was under the influence. When he complied, petitioner hit the front door post with his right foot. Petitioner swayed and leaned against the Stutz. Petitioner did not smell of alcohol. Giles observed petitioner's eyes and breath which appeared normal. (M.T. 79, 81).

In response to Deputy Giles' question as to the day of the week, defendant stated it was Friday. It was actually Saturday. He asked petitioner where he was going and petitioner responded, "Kansas".

Petitioner was arrested for being drunk in a public place in violation of Penal Code §647, subdivision (f), and escorted to the rear seat of the patrol unit. Petitioner swayed as he was physically escorted by Deputy Giles to the partrol unit. On a scale of one to five, Giles rated petitioner's walk as a two, five being the most impaired and one being normal, on his police intoxication form. (M.T. 80). There was a noticeable tremor in petitioner's

hands, and he was pale. Giles did not ask petitioner to perform a field sobriety test. (M.T. 76).

A back-up officer, Deputy Essoe, arrived, and Deputy Giles told him that petitioner was in custody for being under the influence and that he had been giving erroneous information. Both officers proceeded to speak with petitioner.

In responde to Deputy Giles' questioning, defendant stated that his name was Anthony Kaiser, and that he was a produce distributor, and that the Stutz belonged to a Rick Willis. Giles asked for a telephone number for Willis and asked if Willis would be able to come down and show proof of ownership of the Stutz. Petitioner gave a telephone number, but stated Willis had left for Hawaii that morning and suggested that Deputy Giles contact Delphi Auto Design because someone there would be able to identify petitioner and confirm the fact that Willis had given petitioner the car that morning. Giles made no attempt to determine the correctness of the number of

the number or check the listing. (M.T. 63).

When asked to identify Delphi Auto Design, petitioner stated it was a business in which he and Willis were partners. Deputy Giles then stated to defendant that he, Giles, thought petitioner had said he was a produce distributor. Petitioner failed to respond. When asked where his business was located and for a telephone number, petitioner stated it was located in either Newport Beach or Costa Mesa and that he did not know either the street or the telephone number.

Deputy Essoe contacted the desk through the dispatcher to attempt to locate Delphi Auto Design. Deputy Giles testified he did not hear a response from the desk and could not recall if he was informed of a response by Deputy Essoe.

When Deputy Giles advised petitioner of all the inconsistencies in the information he had provided and asked him for his true identity, defendant stated: (1) his real name was Alex Kulik; (2) he had obtained the false social security and Blue Cross

identification cards and the false identification for $100; and (3) he did not have any verification of his identification on him. In response to further questioning, petitioner stated he once had a California driver's license but had let it expire in 1972. The dispatcher was asked to verify this statement.

Petitioner stated he wanted the Stutz locked and left where it was parked. Deputy Giles had received information from the dispatcher that the car was not wanted. The vehicle bore distributor plates (M.T. 85). People walking by and standing around were clearly curious and were looking at the Stutz. However, onlookers "appeared to be going about their business". (M.T. 66). Petitioner started to yell at Deputy Giles to get the people away from the Stutz or he would sue.

Deputy Giles testified he did not know who the owner of the Stutz was and decided to store the Stutz for its safety, pursuant to Vehicle Code §22651. (M.T. 114). He contacted a sergeant for a flatbed truck

because he did not want a tow truck hooking up to the vehicle. Sergeant Voltin responded to the scene and concurred that the Stutz should be stored.

Deputy Giles then observed and seized a metal spoon with a darkened bottom which he testified was in plain view on the right front passenger seat. The officer then looked into the Stutz' glove compartment in an unsuccessful attempt to find its registration.

When Deputy Giles looked into the Stutz he observed a brown paper shopping bag of fruit on the floorboard directly behind the driver's seat. The bottom of the bag had turned a dark brown and it appeared to be wet. He saw one over-ripe banana that was beginning to ooze and relatively fresh lemons, limes, avocados and onions in the bag. He testified that the jail had a policy of not accepting perishable items for suspects in custody.

As a consequence, Deputy Giles reached into the Stutz and picked up the bag. He

intended to discard it so it would not cause any damage to the interior. 2/ Giles did not ask petitioner what to do with the produce bag. (M.T. 44). Giles had no intention of keeping the bag or preserving it for its owner. (M.T. 64).

As Giles was carrying the sack, Deputy Essoe heard petitioner yell two or three times: "Don't touch my car. It is an illegal search. You don't have my permission. Keep out of the car." (R.T. 92, M.T. 91).

As Giles carried it to a planting area located a short distance away, he felt a hard cylindrical object near the bottom of the bag. When Deputy Giles reached the planting area, he reached into the bag to see what the object was and removed it. He

---

2/ Giles also saw a wrapped and an unwrapped chocolate bar in the vehicle; the unwrapped bar was originally on petitioner's lap. Despite the heat and Giles' fear for the safety of the interior, Giles did not discard these items from the vehicle's interior. They were ignored. (M.T. 39-41).

discovered a quart jar filled with a white powdery substance later determined to be heroin. The lid was sealed with a silver colored tape. He then removed a second jar from the sack.

The jars and the bag of fruit were put in the patrol vehicle's trunk. They were transported to the narcotics room at the sheriff's substation where the wet portion of the bag gave way and the fruit rolled out onto the floor. It was discovered at that time that in the bag there was a third jar wrapped in tissue paper.

A search of the petitioner incident to his arrest and before he was removed from the scene revealed that his trousers were wet and yielded: (1) two green pills, which petitioner stated were his wife's tranquilizers; (2) a wallet; (3) an identification; (4) $5,700.00 in hundred dollar bills; and (5) $29.00 in other currency.

Deputy Giles testified that the maximum bail for drunk on drugs and giving false information to an officer would have

been about $500.00. He also testified that petitioner would have been through the booking process normally in six to eight hours if he were sober enough to be booked.

Petitioner slept in the back seat of the patrol vehicle while being driven to the police station.

## REASONS FOR GRANTING THE WRIT

### I

**This Court has not yet articulated a constitutional standard for searches of private property contained in automobiles where the arrestee has expressly asserted a Fourth Amendment interest in the contents and where the vehicle is not subject to search under one of the recognized exceptions to the search warrant requirement.**

Petitioner Kulik was arrested for the minor offense of being drunk in a public place. Ordinarly on this charge the bail would be approximately $500.00 and the booking process would take from six to eight hours. Mr. Kulik had sufficient cash with him to post bail. There was nothing in the circumstances of this arrest to give the police officers probable cause to search petitioner's car. Yet the officers removed

a grocery bag from the car, contrary to the stated objection of the petitioner, and thus discovered the evidence which led to his conviction on charges of transporting a controlled substance.

When a citizen tells a police officer not to search his property, does the officer have the right to ignore the request and undertake a search? It is petitioner's contention that the police must comply with the arrestee's directions concerning his property when it is reasonable to do so. Specifically, when the vehicle is not an instrumentaility or evidence of a crime, when it is legally parked on private property, and when the arrestee has clearly asserted a Fourth Amendment interest in the privacy of its contents, the police may not search the vehicle or its contents.

The removal of the grocery bag from petitioner's automobile was an unreasonable search and seizure under Katz v. United States, 389 U.S. 347; 88 S.Ct. 507, 19 L.Ed. 2d 576, (1967). As Justice Stewart pointed out in that decision, ..."[T]he Fourth

Amendment protects people, not places. ...[W]hat [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." Id. at 351.

The petitioner manifested his expectation of privacy in the automobile and its contents when he told the officer to lock the car and leave it, and to leave the bag in the car and not search it. The officer removed the damp bag to prevent damage to the interior of the automobile. The officer's custodial responsibilities could have been fulfilled without violating petitioner's reasonable expectation of privacy, however. The grocery bag could have been put in the trunk of the automobile or placed inside a carton from the Safeway store. Where the purpose of the search and seizure is to protect the property of the arrestee, the officer should not be allowed to remove the property from the vehichle over the stated objection of the arrestee.

It is not constitutionally significant that the container in this case was a

grocery bag. In Robbins v. California, ____U.S. ____, 101 S.Ct. 2831, ____L.Ed.2d ____ (1981), this Court held a search of a parcel wrapped in opaque plastic violated the Fourth Amendment. The Court found that the petitioner in Robbins had a reasonable expectation of privacy in the unconventionally wrapped package. Under United States v. Chadwick, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977) and Arkansas v. Sanders, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979), luggage found in an automobile is constitutionally protected to the same degree as luggage found in any other place. In Robbins, Justice Stewart expanded the range of "luggage" to include any closed container.

A distinction between types of containers "has no basis in the language or meaning of the Fourth Amendment." Moreover, "even if one wished to import such a distinction into the Fourth Amendment, it is difficult if not impossible to perceive any objective criteria by which that task might be accomplished." ___U.S.

at ___, 101 S.Ct. at 2846, ____L.Ed.2d ____.

The present case closely resembles Robbins and must be governed by it. Robbins was stopped for erratic driving and was discovered to be in possession of marijuana. The petitioner in the present case was arrested for being drunk in a public place. Both Robbins and petitioner Kulik were removed from the vehicles and placed in police cars under arrest. In both Robbins' and Kulik's cases, there were more officers than the single arrestee. In both cases officers conducted a search of the petitioner's automobile and opened a package containing contraband. In neither case was the contraband in plain view.

Justice Stewart noted in Robbins that "What one person may put in a suitcase, another may put in a paper bag." ____U.S. at _____, 101 S.Ct. at 2846, ____L.Ed.2d _____. Similarly, what one person may wrap in opaque plastic and put in a luggage compartment, another may place in a grocery bag on the floor of the back

seat. Justice Stewart would concur in this.

Under Robbins, then, petitioner's grocery bag was a container protected under the Fourth Amendment. The contraband in the grocery bag was not open to plain view. The officer did not discover the jars until he picked up the bag, felt them, and finally probed into the bottom of the bag to "find out what they were." There being no "plain feel" exception, the officer could not constitutionally search the bag without a warrant. The search was illegal.

The one significant difference between the present case and Robbins, and which makes this case stronger than Robbins, is that here the petitioner clearly and unequivocally asserted his Fourth Amendment rights to privacy. He told the officers to leave his belongings in the car. He informed them that they were conducting an illegal search. Robbins made no comparable statement. In the instant case the officers did not have to judge whether the petitioner had an expectation of privacy in the grocery bag: he informed

them that he did. The police are thereupon obligated to obtain a search warrant in this situation. The officers, however, made a subjective determination of the reasonableness of petitioner's expressed expectation of privacy and searched the bag.

Where the officer's determination of what is a reasonable expectation of privacy conflicts with what the arrestee believes is reasonable, whose view should prevail? Which perspective determines whether the officer will undertake a search? As Justice Blackmun pointed out in Arkansas v. Sanders, supra:

> "[S]uppose the arresting officer opens the car's trunk and finds that it contains an array of containers—an orange crate, a lunch bucket, an attache case, a duffel bag, a cardboard box, a backpack, a totebag, and a paper bag. Which of these may be searched

> immediately, and which are so 'personal' that they must be impounded for future search only pursuant to a warrant?" 442 U.S. at 772, 99 S.Ct. 2586, 61 L.Ed.2d 235.

This is the difficulty with a subjective determination.

In no other situation has this Court permitted the police to determine for themselves whether they will honor the assertion of a constitutional right. Under Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Police officers are not even permitted to judge whether a habitual officer is aware of his Fifth and Sixth Amendment rights. A warning or its equivalent may be given in every case. Id. at 468. Moreover, "If the individual indicates in any manner, at any time during the questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment

privilege; any statement taken after the person invokes his privilege cannot be other than the product of complusion..." Id. at 473-474.

The same principle holds where the person under interrogation requests an attorney. Id. at 474. A waiver may not be presumed from the silence of the arrestee. Id. at 475. And the opportunity to exercise these rights continues during the entire interrogation. Id. at 479. In short, once the arrestee asserts any of his Fifth and Sixt Admendment rights, they must be instantly and scrupulously honored. The officer's subjective feelings about the arestee's assertion of his Fifth and Sixth Amendment rights are irrelevant.

The assertion of a Fourth Amendment right should not be treated differently, and in the context of consent searches it is not. Consent searches are an exception to the Fourth Amendment warrant requirement. The scope of a consent search is limited to the area or objects for which consent was given. The police must honor whatever limitations

are imposed. Again, the subjective feelings of the officer are irrelevant. The government carries the burden of proving the consent was voluntary. Bumper v. North Carolina, 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968). If the police are required to respect the assertion of a Fourth Amendment right in the limitation of a consent search, they must likewise be required to respect the assertion of an expectation of privacy in cases such as the present one. A limited consent to search and a refusal to consent to a search must be afforded the same degree of constitutional protection: otherwise the individual who refuses to consent to a search is penalized for exercising a constitutional right.

It remains for this Court to formulate an objective standard to govern police conduct in situations where the arrestee expresses a Fourth Amendment interest in the privacy of his personal property. Whenever the individual asserts a expectation of privacy in the vehicle and his personal property, and where the officer is acting

merely in his custodial capacity, without probable cause to search, the officer must respect the individual's Fourth Amendement right. As long as police officers are permitted to decide independently whether to honor the assertion of a Fourth Amendment right, the protection afforded by the Fourth Amendment will be lost.

The search in the present case was clearly not a consent search and cannot be justified under any of the other exceptions to the warrant requirement. This was not a permissible search under the automobile exception. This exception requires that there exist both probable cause to search and exigent circumstances. Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925); Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970). The latter factor exists when there is a strong likelihood that due to its mobility, the vehicle will disappear before the police officers can obtain a search warrant. Even assuming, arguendo, that there was probable cause for the

arrest of petitioner for being under the influence, there was still insufficient probable cause to search the contents of the vehicle. Probable cause to search is based on different probabilities than probable cause to arrest.

Further, there were no exigent circumstances present to satisfy the second requirement of the automobile exception. The officers had already decided to impound petitioner's car. Once the car was in police custody, there was no likelihood that it would disappear. When exigent circumstances cease to exist, officers must obtain a search warrant. Collidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971).

In some situations the search of an automobile is lawful as a search incident to the arrest of its occupant. Under this exception to the warrant requirement, the person of the arrestee may be searched, as well as the area from which he could conceivably grab a weapon or destroy evidence. Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969).

The search must be contemporaneous in time and place with the arrest. Preston v. United States, 376 U.S. 364, 84 S.Ct. 881, 11 L.Ed2d 777 (1964).

This exception does not fit the facts of the present case. The officers had already searched the petitioner and removed him to the patrol car at the moment Officer Giles entered petitioner's car to remove the grocery bag. The interior of the car was no longer within the scope of the "grabbable area". The search was not incident to the arrest but instead occurred after the arrest had been completed and the arrestee safely put in the patrol car.

The recent case of New York v. Belton, ____U.S. ___, 101 S.Ct. 2860, ___L.Ed. ____ (1981) is not dispositive of this issue. In Belton, the court approved a search of the interior of the petitioner's car where a single patrolman was attempting to transport the four occupants of the car to the station. The four men were standing outside the car and were not physically restrained in any

way. The interior of the car was still within their search. Moreover, it was reasonable to search any personal belongings inside the car, such as a jacket, which they might want to bring along with them in the patrol car. But Belton is not the present case. Here there were two officers arresting the petitioner. He was securely in the patrol car before Officer Giles removed the grocery bag from the automobile. There was no longer any danger that petitioner could obtain a weapon or destroy the contraband.

Nor was this a lawful inventory search. The officers had impounded the automobile and under South Dakota v. Opperman, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976), could have inventoried the contents. The purpose of the inventory is not investigative; rather, it serves to protect the owner's property while it is in police custody, to protect the police from claims of missing property, and to protect the police from possible danger. Id. at 369. In the present case, however, the officers

were not listing the contents of petitioner's automobile on the inventory form. Nor were they removing valuables from the car for safekeeping. Instead, the officers removed petitioner's property from the automobile with the admitted purpose of disposing of it. Moreover, they did this over the petitioner's express assertion of his Fourth Amendment expectation of privacy. The danger Justice Marshall warned of in his dissent in Opperman was realized in the present case: the elevation of "the conservation of property interests - indeed mere possiblities of property interests - above the privacy and security interests protected by the Fourth Amendment." Id. at 395-96. Here the officers' concern for the interior of the car due to the overripe banana in the grocery bag was elevated above the petitioner's expressed Fourth Amendment interest. Surely, in balancing property interests and Fourth Amendment interests the balance must weigh in favor of constitutional rights.

II

The Court should define the reasonable scope of the custodial responsibilities of the police where the decision to impound a vehicle is discretionary.

There was no stolen car report on petitioner's automobile. It is logical to assume that an expensive car, a Stutz Blackhawk, would be missed if it were stolen and that a report would have been filed. The officers' decision to impound the automobile in the absence of such a report was purely discretionary. The record is clear: the attention of passersby was directed at the police contact with petitioner. Previous to this the car had gone unnoticed.

In this situation the arrestee's directions concerning the disposition of his vehicle must be considered. The petitioner's request in the present case that the officers lock the car and leave it where it was parked was reasonable. The

automobile was legally parked on private property. It was not the instrumentality or evidence of a crime. Petitioner was likely to have been released on bail that same day. The officers could have checked with Delphi Auto Design to make arrangements for its safekeeping.

Professor LaFave suggests the arresting officer must comply with any reasonable alternative disposition of the vehicle requested by the arrestee. Reasonable alternatives could include locking the car and leaving it at the scene, moving it to a nearby safe place, allowing a passenger to take custody of the vehicle, or locking any valuables in the trunk. 2 LaFave, Search and Seizure: A Treatise on the Fourth Amendment 559 (1978). In the present case it would have been reasonable to lock the car and leave it parked in the Safeway lot. Alternatively, the officers could have contacted Delphi Auto Design and asked them to take the automobile.

There was absolutely no justification in this case for the removal of the grocery

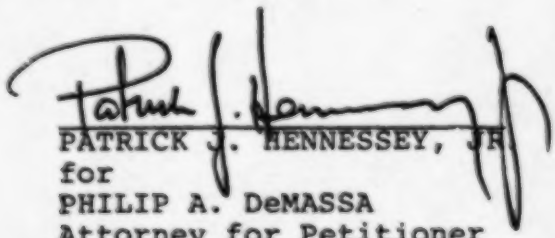
bag from the automobile. Where impoundment is discretionary, custodial care by the police must be limited to that reasonably requested by the arrestee. Here the petitioner told the officers to leave his belongings in the car. He informed them that they were conducting an illegal search. They ignored him.

The removal of the grocery bag by the officers exceeded the scope of reasonable custodial care required by these circumstances. The officers used their custodial function as an excuse to conduct an illegal search. It is imperative that this Court define the scope of permissible custodial care where it is unnecessary to impound a vehicle. Police officers should not be permitted to ignore the arrestee's reasonable assertion of his Fourth Amendment rights.

## CONCLUSION

For all the reasons stated herein, petitioner respectfully requests this Court to grant the writ prayed for and review the decision below.

DATED: October 2, 1981



PATRICK J. HENNESSEY, JR.
for
PHILIP A. DeMASSA
Attorney for Petitioner
ALEXANDER KULIK

# APPENDIX "A"

(Not to be published in official reports)

COURT OF APPEAL, FOURTH DISTRICT

SECOND DIVISION

STATE OF CALIFORNIA

| | |
|---|---|
| PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. ALEXANDER KULIK, Defendant and Appellant. | 4 Crim. No. 10520 (Super. Ct. No. C39308) O P I N I O N |

APPEAL from a judgment of the Superior Court of Orange County. Paul Mast, Judge.* Affirmed.

Philip A. DeMassa, for Defendant and Appellant.

George Deukmejian, Attorney General, Jay M. Bloom and A. Wells Petersen, Deputy Attorneys General, for Plaintiff and Respondent.

---

* Assigned by Chairperson of the Judicial Council.

APPENDIX "A"

By information defendant was charged with transportation of heroin (Health & Saf. Code, § 11352) in count 1, and with possession of heroin for sale (Health & Saf. Code, § 11351) in count 2. The jury found defendant guilty of count 1 and could not reach a verdict on count 2. The court declared a mistrial on count 2 and later dismissed it. Defendant appealed from the judgment of conviction under count 1, transportation of heroin.

Defendant contends: (1) the trial court used an improper standard in ruling on the pretrial motions to suppress; (2) there was insufficient probable cause for his arrest; (3) the entry into the vehicle and later search of the shopping bag were unlawful; (4) the search warrant for the vehicle was invalid as the fruit of the poisonous tree; (5) the search warrants for the Newport Beach residence, the motorhome, and the Leucadia residence were issued without probable cause; (6) the trial court erred in failing to instruct the jury on a lesser included offense, i.e., possession

of heroin as a lesser included offense of possession of heroin for sale; and (7) the trial court erred in using the same facts for imposition of the upper term and for imposition of consecutive terms.

FACTS

Evidence presented at the pretrial hearing on the Penal Code section 1538.5 motion to suppress established that at 12:50 p.m. on October 22, 1977, Orange County Deputy Sheriff Robert Giles was dispatched via his patrol unit's radio to a Safeway supermarket in Mission Viejo to look for a drunk in a Stutz Blackhawk sedan.

When Deputy Giles arrived on the scene, he observed a Stutz Blackhawk sedan parked in a marked parking space in the center of the lot adjacent to the Safeway and several small businesses. He pulled up behind the vehicle and parked.

As Deputy Giles walked to the driver's side of the Stutz, he observed defendant seated in the driver's seat with his head on the steering wheel. When Deputy Giles

tapped several times on the closed window with his knuckles, defendant sat upright and looked about for several seconds. Defendant's hair was disheveled and his clothes were wrinkled.

Deputy Giles tapped on the window again and told defendant to roll it down. Defendant turned around, looked toward the officer, and complied with his request. Deputy Giles observed that defendant was sweating heavily and he had a brown substance smeared around his mouth. He smelled of a musty odor. When Deputy Giles asked defendant it he were all right, defendant replied that he was. Defendant's hands were on the steering wheel and Deputy Giles observed there was a dark or dirty substance underneath his finger nails and around the cuticle of those finger nails.

Deputy Giles asked defendant for identification. Defendant opened a wallet, looked through it, closed it up and stated he did not have any. The deputy had observed papers in the wallet. When

asked if he had a driver's license, defendant took a piece of paper he identified as his birth certificate out of the wallet and handed it to Deputy Giles. This paper was a Nevada birth certificate for an Anthony William Kaiser, born March 21, 1950.

After Deputy Giles had asked defendant if he were Anthony Kaiser and received an affirmative response, the officer asked defendant for his birthdate and his age. Defendant stated he was born on March 27, 1947, and was 27 years old. He hesitated a moment and then said he was 29.

Deputy Giles asked defendant for the Stutz' registration or other proof of ownership. Defendant replied that he did not have any because it was a leased car. Deputy Giles testified that defendant spoke very slowly, that his speech was slurred and that the would begin to answer questions in a normal tone of voice and then trail off until he could barely be heard. When defendant looked at Deputy Giles and tried to concentrate, his eyes would close.

Deputy Giles asked defendant to get out

of the Stutz because Giles suspected defendant was under the influence. When he complied, defendant hit the front door post with his right foot. Defendant swayed and leaned against the Stutz. Defendant did not smell of alcohol.

In response to Deputy Giles' question as to the day of the week, defendant stated it was Friday. It was actually Saturday. He asked defendant where he was going and defendant responded, "Kansas".

Defendant was arrested for being drunk in a public place in violation of Penal Code § 647, subdivision (f), and escorted to the rear seat of the patrol unit. Defendant swayed as he was physically escorted by Deputy Giles to the patrol unit. There was a noticeable tremor in defendant's hands, and he was pale.

A back-up officer, Deputy Essoe, arrived, and Deputy Giles told him that defendant was in custody for being under the influence and that he had been giving erroneous information. Both officers proceeded to speak with defendant.

In response to Deputy Giles' questioning, defendant stated that his name was Anthony Kaiser, that he was a produce distributor, and that the Stutz belonged to a Rick Willis. Deputy Giles asked defendant for a telephone number for Willis and asked if Willis would be able to come down and show proof of ownership of the Stutz. Defendant gave a telephone number, but stated Willis had left for Hawaii that morning and suggested that Deputy Giles contact Delphi Auto Design because someone there would be able to identify defendant and confirm the fact that Willis had given defendant the car that morning.

When asked to identify Delphi Auto Design, defendant stated it was a business in which he and Willis were partners. Deputy Giles then stated to defendant that he, Giles, thought defendant had said he was a produce distributor. Defendant failed to respond to the implied inconsistency. When asked where his bsuiness was located and for a telephone number, defendant stated it was located

in either Newport Beach or Costa Mesa and that he did not know either the street or the telephone number.

Deputy Essoe contacted the desk through the dispatcher to attempt to locate Delphi Auto Design. Deputy Giles testified he did not hear a response from the desk and could not recall if he was informed of a response by Deputy Essoe.

When Deputy Giles advised defendant of all the inconsistencies in the information he had provided and asked him for his true identity, defendant stated: (1) his real name was Alex Kulik; (2) he had obtained the false social security and Blue Cross identification cards and the false identification for $100; and (3) he did not have any verification of his identification on him. In response to further questioning, defendant stated he once had a California driver's license but had let it expire in 1972. The dispatcher was asked to verify his statement.

Defendant stated he wanted the Stutz

locked and left where it was parked. Deputy Giles had received information from the dispatcher that the car was not wanted. People walking by and standing around were clearly curious and were looking at the Stutz. Defendant started to yell at Deputy Giles to get the people away from the Stutz or he would sue.

Deputy Giles testified he did not know who the owner of the Stutz was and decided to store the Stutz for its safety. He contacted a sergeant for a flatbed truck because he did not want a tow truck hooking up to the vehicle. Sergeant Voltin responded to the scene and concurred that the Stutz should be stored.

Deputy Giles then observed and seized a metal spoon with a darkened bottom which he testified was in plain view on the right front passenger seat. The officer then looked into the Stutz' glove compartment in an unsuccessful attempt to find its registration. As of that moment, the ownership of the Stutz was very much in question.

When Deputy Giles looked into the Stutz he otherwise observed a brown paper shopping bag of fruit on the floorboard directly behind the driver' seat. The bottom of the bag had turned a dark brown and it appeared to be wet. He saw an overripe banana that was beginning to ooze and relatively fresh lemons, limes, avocados and onions in the bag. He testified that the jail had a policy of not accepting perishable items for suspects in custody.

As a consequence, Deputy Giles reached into the Stutz and picked up the bag. He intended to discard it so it would not cause any damage to the interior. As he carried it to a planting area located a short distance away, he felt a hard cylindrical object near the bottom of the bag. When Deputy Giles reached the planting area, he reached into the bag to see what the object was and removed it. He discovered a quart jar filled with a white powdery substance later determined to be heroin. The lid was sealed with a

silver colored tape. He then removed a second jar from the sack.

The jars and the bag of fruit were put in the patrol vehicle's trunk. They were transported to the narcotics room at the sheriff's substation where the wet portion of the bag gave way and the fruit rolled out onto the floor. It was discovered at that time that in the bag there was a third jar wrapped in tissue paper.

A search of defendant incident to his arrest and before he was removed from the scene revealed that his trousers were wet and yielded: (1) two green pills, which defendant stated were his wife's tranquilizers; (2) a wallet; (3) an idnetification; (4) 57 one hundred bills; and (5) $29 in other currency.

Deputy Giles testified that the maximum bail for drunk on drugs and giving false information to an officer would have been about $500. He also testified that defendant would have been through the booking process normally in six to eight hours if he were sober enough to be booked.

Defendant slept in the back seat of the patrol vehicle while being driven to the police station.

STANDARD OF REVIEW

Initially, defendant contends that the trial court which heard the motion to suppress made a fundamental error concerning the underlying rationale for the exclusionary rule and its application in criminal cases and, as a result, that it applied an improper standard of review, i.e., the public's right to a trial on the merits regardless of the legality of police conduct.

Defendant cites in support of this contention the trial court's comments, as follows:

"In this case it appears to the Court that the police and District Attorney's office worked long and hard hours on an extremely complicated case. This is not a case for penalizing the police for unlawful police conduct. To the extent that the cases relate to deterring unlawful police

conduct in terms of punishing the police, it always appeared to me that when we talk about punishing the constable for blundering, that we're not really punishing the authorities. We really punish society by not having a trial on the merits of guilt or innocence.

"This is by no means saying this Court is ignoring the mandates of our state and Federal Constitutions and the appellate [sic] cases interpreting them. Our constitutions and cases speak of unreasonable searches and seizures and with that I am trying to deal."

These remarks are merely a statement of the court's personal beliefs concerning the exclusionary rule and a comment on the lack of police culpability. It does not follow from these beliefs that the court used an improper standard.

It is clear from an examination of the reporter's transcript of the court's oral findings that they are all supported by substantial evidence. This is what we

measure in our review. (People v. Lawler, 9 Cal.3d 156, 160.) The court was only commenting on the overall case in light of the appropriate standard which it used in considering the evidence.

LEGALITY OF ARREST

Defendant contends there was insufficient probable cause for his arrest for violating Penal Code section 647, subdivision (f). He argues that no evidence was presented to show that Deputy Giles was qualified to detect whether defendant was intoxicated. He contends further that Deputy Giles did not observe anything to indicate that defendant was intoxicated.

Deuty Giles testified that he had been a peace officer for five years, the last two and one half of which he had been a patrolman. He testified further that he had made at least 100 arrests of persons who were under the influence of alcohol and 25 or so arrests of persons who were under the influence of other intoxicants.

Although he stated he had formed an opinion as to whether defendant was intoxicated, Deputy Giles was never asked to state his opinion.

The trial court found that there was probable cause to arrest defendant. This finding is supported by substantial evidence. The trial court noted that Deputy Giles had observed defendant was swaying, his eyes kept closing, he had wet his pants, his hair was disheveled, and he thought it was a different day of the week than it was. We also note that Deputy Giles testified defendant's speech was slow and slurred, he was sweating, there was a noticeable tremor in his hands, he was pale, he had difficulty getting out of the Stutz, and he leaned against the Stutz for support.

Deputy Giles had had enough expertise to determine that defendant was under the influence of drugs. Therefore, he had probable cause to arrest defendant for violating Penal Code section 647, subdivision (f).

SEIZURE OF HEROIN FILLED JARS

Defendant contends the heroin in the quart jars was unlawfully seized on the following theories: (1) the search of the Stutz and the grocery bag were not lawful under the emergency exception to the search warrant requirement; (2) the search was not a valid inventory search; (3) there was no authority in the Vehicle Code for removing the Stutz from private property; and (4) the search of the closed paper bag was improper.

We hold, on the basis of the facts recited above, that Deputy Giles did not search the Stutz and, consequently, the emergency exception and the rules governing inventory searches are inapplicable in this case.

When Deputy Giles decided to store the Stutz Black hawk sedan for its own safety, he was engaged in one of the primary duties of a police officer, the protection of property. (See People v. Parra, 30 Cal.App.3d 729, 732-733. ) The trial court found that the deputy acted

reasonably in deciding to impound the Stutz. This finding is supported by substantial evidence. The Stutz was on private property in the parking lot of a shopping center. There were curious bystanders, including children, gathered at the scene looking at the vehicle, which was a unique, attention grabbing expensive vehicle. Although defendant possessed enough money to post bail, it was not clear at the time the decision to impound was made whether he would be released on bail and thus be able to return to the Stutz within the six to eight hour minimum period. A doubt also remained as to who actually owned the Stutz.

Even though defendant asked Deputy Giles to secure and leave the Stutz where it was parked, the officer acted reasonably in not acceding to this request. Initially, it was unclear to the officer whether defendant was sufficiently sober and rational to make such a request. Furthermore, the trial court's finding

that the officer's belief that the ownership and legal possession of the Stutz were in question and that it might have been stolen, even though not reported as such, was supported by substantial evidence. Defendant had failed to produce the automobile's registration and he had failed to substantiate his statement that the Stutz had been leased and had been turned over to him to drive that morning.

Once the officer decided to safeguard the Stutz by impounding it, he acted reasonably in removing the wet grocery bag that appeared to be filled with overripe fruit, this in order to keep the rear seat floor covering from being damaged. When he felt the hard cylindrical object in the bag while he was carrying it to an adjacent area to be discarded, he had a duty to determine the identity of that object to determine whether to preserve it or discard it also.

The discovery of the heroin filled jars was not the result of an illegal search or any unlawful conduct by Deputy Giles who

was merely engaged in conduct which he reasonably believed was necessary to preserve and protect an expensive automobile.

SEARCH WARRANT FOR STUTZ

The affidavit supporting the search warrant for the Stutz was based upon evidence seized from defendant when he was arrested. Defendant's only objection to the legality of the search of the Stutz is based on his contention that the initial discovery of the heroin filled jars was unlawful and that anything that flowed from that discovery is fruit of the poisonous tree and must be suppressed.

There is no merit in this contention. We have held that the heroin filled jars were lawfully discovered and seized.

OTHER SEARCH WARRANTS

Defendant contends there was insufficient probable cause for the issuance of the search warrants for the Newport Beach residence, the motorhome and the Leucadia residence.

We need not determine whether these search warrants were valid, because the only evidence seized when they were executed was admitted only to prove count 2. That count has been dismissed by the trial court.

LESSER INCLUDED OFFENSE

As his sixth assignment of error defendant urges that the trial court erred in failing sua sponte to instruct the jury on possession of heroin as a lesser included offense. Included within what? A fair reading of the defendant's brief suggests that this contention was made with reference to the possession for sale count. However, that count was dismissed because the jury had hung up on it, and so it could reasonably be observed that any error here assigned is now moot. Nevertheless, at oral argument, it came out unequivocally that the claimed error was still being pursued as to count 1, transportation of heroin.

The trial court must instruct the jury sua sponte on lesser included offenses

when the evidence raises a question as to whether all of the elements of the charged offense were present. (People v. Sedeno, 10 Cal.3d 703, 716-716, revd. on other grounds, People v. Flannel, 25 Cal. 3d 668, 684, fn. 12.)

The point to be resolved then is whether the evidence justified the sua sponte instruction. It is clear that it did not. Here it should be noted that the defense to count 1 was not that defendant had merely possessed the heroin. The defense was that defendant had borrowed the Stutz not knowing that heroin was in it. Never was it defendant's theory that someone else had driven the Stutz to the Safeway parking lot and then detailed defendant to keep watch over the contraband.

Thus, transportation was never disputed, only whether defendant knew the contraband was present in the Stutz. Accordingly, it was up to the jury to decide whether defendant knew of the heroin and realized its nature as a controlled substance. On

this issue the jury was instructed.

It was the defendant's knowledge of the presence of the heroin which was the key issue of fact as to count 1. Because there was no element of transportation in question which would have supported a possession conviction rather than a transporation conviction, the defendant faced being found guilty of the greater offense or nothing. In other words, if the jury had believed defendant, they could not have convicted him either of transportation or possession.

Under such circumstances as here obtained, there was no need or purpose for giving included offense instructions. (People v. Sedeno, supra, 10 Cal.3d 703, 715.) In other words, possession is not invariably or necessarily a lesser included offense of transportion. (People v. Rogers, 5 Cal.3d 129, 134.) Based upon the foregoing, we hold that it was not error to fail sua sponte to instruct the jury on the offense of possession.

## PROPRIETY OF SENTENCING

Finally, defendant contends the trial court improperly considered the same circumstances, the fact the crime involved a large quantity of heroin and the fact defendant had a prior 1969 related marijuana conviction, to impose the upper term and to impose consecutive sentences, which, according to defendant, was in violation of California Rules of Court, rule 441, subdivision (c).

The trial court sentenced defendant to the five year upper term for transportation of heroin and made this sentence consecutive to a previously imposed federal sentence.

While it appears from the reporter's transcript that the trial court initially indicated these two facts would be the basis for imposing both the upper term and the consecutive sentence, the court did not do so after being reminded by counsel that different facts must be used for aggravation and consecutive sentencing.

The trial court correctly relied on the fact the crime involved a large amount of contraband (Calif. Rules of Court, rule 421, subd. (a)(11)) to impose the upper term. The court then relied on the fact that defendant had served a prior prison sentence (Calif. Rules of Court, rule 425, subd. (b), rule 421, subd. (b)(3)) to impose a consecutive sentence.

The judgment is affirmed.

/s/ McDaniel
J.

We concur:

/s/ Kaufman
Acting P.J.

/s/ Goldstein
J.*

*Assigned by the Chairperson of the Judicial Council.

# Opposition

No. 81-650

Office - Supreme Court, U.S.
FILED
DEC 18 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

# Supreme Court of the United States

October Term, 1981

ALEXANDER KULIK,

*Petitioner,*

*v.*

THE PEOPLE OF THE STATE OF CALIFORNIA,

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
FOR THE FOURTH APPELLATE DISTRICT

## BRIEF OF RESPONDENT IN OPPOSITION

GEORGE DEUKMEJIAN,
Attorney General
ROBERT H. PHILIBOSIAN,
Chief Assistant
Attorney General--
Criminal Division
DANIEL J. KREMER,
Assistant Attorney General
STEVEN V. ADLER,
Deputy Attorney General
JAY M. BLOOM,
Deputy Attorney General

110 West A Street, Suite 700
San Diego, California 92101
Telephone: (714) 237-7750

Attorneys for Respondent

INTERIM PRINTING & MAILING COMPANY
1105 WEST MORENA BOULEVARD, SAN DIEGO, CALIFORNIA 92110 — 275-3050

## QUESTIONS PRESENTED

1. Whether is was proper for the police to impound a vehicle and inventory a paper bag found in that vehicle when the vehicle was an unusual one, was parked where the public was looking at it, petitioner had threatened to sue the police if persons came near it, and petitioner had to be arrested and removed from the vehicle?

2. Whether the search of the paper bag in the passenger area of the vehicle was proper as a search incident to a valid arrest?

3. Whether the police needed a search warrant to search the paper bag when petitioner had no expectation of privacy in that paper bag?

TOPICAL INDEX


| | Pages |
|---|---|
| OPINION BELOW | 1 |
| JURISDICTION | 2 |
| STATUTES INVOLVED | 2 |
| STATEMENT OF THE CASE | 2 - 3 |
| STATEMENT OF FACTS | 3 - 14 |
| SUMMARY OF ARGUMENT | 14 - 16 |
| ARGUMENT | 16 - 32 |
| I THE SEARCH OF THE BAG WAS PROPER AS IT WAS EXAMINED AS PART OF THE POLICE DECISION TO IMPOUND PETITIONER'S UNUSUAL AND EXPENSIVE VEHICLE | 16 - 24 |
| II THE BAG WAS PROPERLY SEARCHED INCIDENT TO PETITIONER'S ARREST | 24 - 31 |
| III THE SEARCH OF THE CONTAINER WAS ALSO PROPER AS PETITIONER HAD NO EXPECTATION OF PRIVACY | 31 - 32 |
| CONCLUSION | 33 |
| APPENDICES | |

# TABLE OF AUTHORITIES


| | Pages |
|---|---|
| CASES | |
| Cady v. Dombrowski (1973) 413 U.S. 433 | 18 |
| Cooper v. California (1967) 386 U.S. 58 | 17 |
| Harris v. United States (1968) 390 U.S. 234 | 18 |
| Mozzetti v. Superior Court (1971) 4 Cal.3d 699 | 19 |
| New York v. Belton (1981) ___ U.S. ___ (69 L.Ed.2d 768) | 15,25, 28 |
| Robbins v. California (1981) ___ U.S. ___ (69 L.Ed.2d 744) | 28,29, 30 |
| South Dakota v. Opperman (1976) 428 U.S. 364 | 15,17, 19,22 |
| United States v. Honigman (9th Cir. 1980) 633 F.2d 1336 | 15,32 |
| United States v. Mackey (9th Cir. 1980) 626 F.2d 684 | 15,32 |
| United States v. Matthews (10th Cir. 1980) 615 F.2d 1279 | 22 |

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1981

No. 81-650

---

ALEXANDER KULIK,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

---

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
FOR THE FOURTH APPELLATE DISTRICT

---

BRIEF OF RESPONDENT IN OPPOSITION

---

## OPINION BELOW

The California Court of Appeal, Fourth Appellate District, Division Two, received petitioner's direct appeal from a judgment of conviction. In an unpublished opinion, the court found no merit to petitioner's contentions and affirmed the judgment. (Appen. A.)

## JURISDICTION

This Court has jurisdiction to consider this case pursuant to 28 U.S.C. 1257, subdivision 3.

## STATUTES INVOLVED

The applicable statutes involved are set forth in Appendix C.

## STATEMENT OF THE CASE

An information filed in the Superior Court of Orange County, charged petitioner in court I with transportation of heroin (Health & Saf. Code, § 11352) and in count II with possession of heroin for sale (Health & Saf. Code, § 11351). (Appen. A, p. 1.)

A motion to suppress evidence was heard and denied. (Pen. Code, § 1538.5.) The jury convicted petitioner in count I and a mistrial was declared as to count II. Court II was untimately dismissed. (Appen. A, pp. 1-2.)

Petitioner was sentenced to state prison for five years. The term was to be served consecutive to a previously imposed federal sentence. (Appen. A, p. 15.) Petitioner appealed his conviction under count I to the Court of Appeal, Fourth Appellate District, Division Two. (Appen. A.)

In an unpublished opinion, the court affirmed the judgment. (Appen. A.) On August 6, 1981, the California Supreme Court denied a hearing. (Appen. B.)

## STATEMENT OF FACTS

The facts are aptly set out in the opinion of the Court of Appeal, for the Fourth Appellate District, Division Two, and are as follows.

Evidence presented at the pretrial hearing on the Penal Code section 1538.5 motion to suppress established that at 12:50

p.m. on October 22, 1977, Orange County Deputy Sheriff Robert Giles was dispatched via his patrol unit's radio to a Safeway supermarket in Mission Viejo to look for a drunk in a Stutz Blackhawk sedan.

When Deputy Giles arrived on the scene, he observed a Stutz Blackhawk sedan parked in a marked parking space in the center of the lot adjacent to the Safeway and several small businesses. He pulled up behind the vehicle and parked.

As Deputy Giles walked to the driver's side of the Stutz, he observed petitioner seated in the driver's seat with his head on the steering wheel. When Deputy Giles tapped several times on the closed window with his knuckles, petitioner sat upright and looked about for several seconds. Petitioner's hair was disheveled and his clothes were wrinkled.

Deputy Giles tapped on the window again and told petitioner to roll it down. Petitioner turned around, looked toward the officer and complied with his request. Deputy Giles observed that petitioner was sweating heavily and he had a brown substance smeared around his mouth. He smelled of a musty odor. When Deputy Giles asked petitioner if he were all right, petitioner replied that he was. Petitioner's hands were on the steering wheel and Deputy Giles observed there was a dark or dirty substance underneath his finger nails and around the cuticle of those finger nails.

Deputy Giles asked petitioner for identification. Petitioner opened a wallet, looked through it, closed it up and stated he did not have any. The deputy had observed papers in the wallet. When asked if he had a driver's license,

petitioner took a piece of paper he identified as his birth certificate out of the wallet and handed it to Deputy Giles. This paper was a Nevada birth certificate for an Anthony William Kaiser, born March 21, 1950.

After Deputy Giles had asked petitioner if he were Anthony Kaiser and received an affirmative response, the officer asked petitioner for his birthdate and his age. Petitioner stated he was born on March 27, 1947, and was 27 years old. He hesitated a moment and then said he was 29.

Deputy Giles asked petitioner for the Stutz' registration or other proof of ownership. Petitioner replied that he did not have any because it was a leased car. Deputy Giles testified that petitioner spoke very slowly, that his speech was slurred and that he would begin to

answer questions in a normal tone of voice and then trail off until he could barely be heard. When petitioner looked at Deputy Giles and tried to concentrate, his eyes would close.

Deputy Giles asked petitioner to get out of the Stutz because Giles suspected petitioner was under the influence. When he complied, petitioner hit the front door post with his right foot. Petitioner swayed and leaned against the Stutz. Petitioner did not smell of alcohol.

In response to Deputy Giles' question as to the day of the week, he stated it was Friday. It was actually Saturday. He asked petitioner where he was going and he responded, "Kansas."

Petitioner was arrested for being drunk in public place in violation of Penal Code section 647, subdivision

(f), and escorted to the rear seat of the patrol unit. He swayed as he was physically escorted by Deputy Giles to the patrol unit. There was a noticeable tremor in his hands and he was pale.

A back-up officer, Deputy Essoe, arrived and Deputy Giles told him petitioner was in custody for being under the influence and that he had been giving erroneous information. Both officers proceeded to speak with petitioner.

In response to Deputy Giles' questioning, petitioner stated that his name was Anthony Kaiser, that he was a produce distributor, and that the Stutz belonged to a Rick Willis. Deputy Giles asked petitioner for a telephone number for Willis and asked if Willis would be able to come down and show proof of ownership of the Stutz. Petitioner gave a telephone number, but stated Willis had

left for Hawaii that morning and suggested that Deputy Giles contact Delphi Auto Design because someone there would be able to identify petitioner and confirm the fact that Willis had given petitioner the car that morning.

When asked to identify Delphi Auto Design, petitioner stated it was a business in which he and Willis were partners. Deputy Giles then stated to petitioner that he, Giles, thought petitioner had said he was a produce distributor. Petitioner failed to respond to the implied inconsistency. When asked where his business was located and for a telephone number, he stated it was located in either Newport Beach or Costa Mesa and that he did not know either the street or the telephone number.

Deputy Essoe contacted the desk through the dispatcher to attempt to locate Delphi Auto Design. Deputy Giles testified he did not hear a response from the desk and could not recall if he was informed of a response by Deputy Essoe.

When Deputy Giles advised petitioner of all the inconsistencies in the information he had provided and asked him for his true identity, he stated: (1) his real name was Alex Kulik; (2) he had obtained the false social security and Blue Cross identification cards and the false identification for $100.00; and (3) he did not have any verification of his identification on him. In response to further questioning, petitioner stated he once had a California driver's license but had let it expire in 1972. The dispatcher was asked to verify this statement.

Petitioner stated he wanted the Stutz locked and left where it was parked. Deputy Giles had received information from the dispatcher that the car was not wanted. People walking by and standing around were clearly curious and were looking at the Stutz. Petitioner started to yell at Deputy Giles to get the people away from the Stutz or he would sue.

Deputy Giles testified he did not know who the owner of the Stutz was and decided to store the Stutz for its safety. He contacted a sergeant for a flatbed truck because he did not want a tow truck hooking up to the vehicle. Sergeant Voltin responded to the scene and concurred that the Stutz should be stored.

Deputy Giles then observed and seized a metal spoon with a darkened bottom which he testified was in plain view on the right front passenger seat. The officer

then looked into the Stutz' glove compartment in an unsuccessful attempt to find its registration. As of that moment, the ownership of the Stutz was very much in question.

When Deputy Giles looked into the Stutz he otherwise observed a brown paper bag of fruit on the floorboard directly behind the driver's seat. The bottom of the bag had turned a dark brown and it appeared to be wet. He saw an overripe banana that was beginning to ooze and relatively fresh lemons, limes, avocados and onions in the bag. He testified that the jail had a policy of not accepting perishable items for suspects in custody.

As a consequence, Deputy Giles reached into the Stutz and picked up the bag. He intended to discard it so it would not cause any damage to the interior. As he carried it to a planting

area located a short distance away, he felt a hard cylindrical object near the bottom of the bag. When Deputy Giles reached the planting area, he reached into the bag to see what the object was and removed it. He discovered a quart jar filled with a white powdery substance later determined to be heroin. The lid was sealed with a silver colored tape. He then removed a second jar from the sack.

The jars and the bag of fruit were put in the patrol vehicle's trunk. They were transported to the narcotics room at the sheriff's substation where the wet portion of the bag gave way and the fruit rolled out onto the floor. It was discovered at that time that in the bag there was a third jar wrapped in tissue paper.

A search of petitioner incident to his arrest and before he was removed

from the scene revealed that his trousers were wet and yielded: (1) two green pills, which petitioner stated were his wife's tranquilizers; (2) a wallet; (3) an identification; (4) 47 one hundred bills; and (5) $29.00 in other currency.

Deputy Giles testified that the maximum bail for drunk on drugs and giving false information to an officer would have been about $500.00. He also testified that petitioner would have been through the booking process normally in six to eight hours if he were sober enough to be booked.

Petitioner slept in the back seat of the patrol vehicle while being driven to the police station.

## SUMMARY OF ARGUMENT

The seizure of the bag in the passenger area of the vehicle and the search

of the bag was proper after the police felt it was necessary to impound the vehicle to protect the vehicle, the interests of its true owner, the interests of the shopping center, and the potential liability of the police. (South Dakota v. Opperman (1976) 428 U.S. 364.)

The bag could properly be searched incident to petitioner's arrest as the bag was in the passenger area and petitioner's arrest terminated any right to privacy he may have had in the bag. (New York v. Belton (1981) ___ U.S. ___ (69 L.Ed.2d 768).)

The bag could also properly be searched as it was in the passenger area and petitioner had no right to privacy in the paper bag. (United States v. Mackey (9th Cir. 1980) 626 F.2d 684, 687; United States v. Honigman (9th Cir. 1980) 633 F.2d 1336.)

Therefore, the petition for writ of certiorari should be denied.

## ARGUMENT

### I

### THE SEARCH OF THE BAG WAS PROPER AS IT WAS EXAMINED AS PART OF THE POLICE DECISION TO IMPOUND PETITIONER'S UNUSUAL AND EXPENSIVE VEHICLE

Petitioner basically alleges the examination of the paper bag which resulted in the police locating heroin in jars inside the paper bag was unlawful. This is not the case.

At the outset it is evident the conduct of the police may be justified as part of their lawful right to impound vehicles and inventory contents of such vehicles. The authority of police to seize and remove from the streets vehicles impeding traffic, threatening public safety, or the public convenience is

beyond challenge. (South Dakota v. Opperman (1976) 428 U.S. 364, 369.) When vehicles are impounded, local police departments generally follow a routine practice of securing and inventorying the automobile's contents. These procedures have developed in response to three distinct needs: (1) protection of the owner's property while it remains in police custody; (2) protection of the police against claims or disputes over lost or stolen property; and (3) protection of the police from potential danger. (Id.) Indeed, "The practice has been viewed as essential to respond to incidents of theft or vandalism." (Id.)

In Cooper v. California (1967) 386 U.S. 58, this Court upheld the inventory of a car impounded under the authority of a state forfeiture statute. Even though the inventory was conducted in a distinctly criminal setting and

carried out a week after the car had been impounded, this Court concluded the car search, including an examination of the glove compartment where contraband was found, was reasonable under the circumstances.

Also in Harris v. United States (1968) 390 U.S. 234, this Court upheld the introduction of evidence seized by an officer who, after conducting an inventory search of a car and while taking means to safeguard it, saw a car registration card in his plain sight. The court concluded the intrusion was justifiable since it was taken to protect the car in police custody. An inventory search pursuant to an impound was also upheld in Cady v. Dombrowski (1973) 413 U.S. 433, 436. Thus, this Court has repeatedly upheld police inventory searches of vehicles where there was need for such a search after an impound of a

vehicle. The key question posed by this Court was whether the conduct of the police was reasonable under the circumstances. (South Dakota v. Opperman, supra, 428 U.S. 364.)

Furthermore, although California law might be different than the rules espoused by this Court for inventory searches (see, e.g., Mozzetti v. Superior Court (1971) 4 Cal.3d 699), this is of no import here. The question here is not whether the search was authorized by state law. Rather, the question is whether the search was reasonable under the Fourth Amendment. (South Dakota v. Opperman, supra, at p. 372.) Since the conduct of the police here was eminently reasonable and in accord with the dictates of the Fourth Amendment, petitioner's complaints here are meritless.

Police had found petitioner in a unique and unusual car - a Stutz Blackhawk.

The vehicle was parked in the parking lot of a shopping center, and there were people milling about the car as the police dealt with petitioner. Furthermore, the record indicates petitioner was in a sorry state and had been arrested for being under the influence of alcohol or drugs in a public place (Pen. Code, § 647, subd. (f)). When people came over by the car, petitioner started to yell at Deputy Giles to get people away from the Stutz or he would sue. There were also serious questions in the mind of the police as to who the exact owner of the vehicle was since petitioner could not furnish any proof of ownership and had given the police different identities and conflicting information on various matters.

In light of the unusual and valuable nature of the vehicle (a Stutz Blackhawk), the fact people had been seen

milling about the car in the public parking lot, petitioner's threat to sue, and the fact there was a real question whether petitioner owned the vehicle; it was reasonable for the police to impound the vehicle to protect their own interests from a law suit and protect the vehicle and its true owner from damage by vandals or a car theft. Thus, the impound procedure was proper.

Moreover, the police had some obligation to the leasor and leasees of the shopping center which required the police remove the car so it did not unnecessarily infringe on space in the parking lot or become a nuisance by attracting interested onlookers. Furthermore, the police had an obligation not to leave the car at the lot where it might be taken or vandalized causing the lessor or lessees of the center

to be sued by petitioner for loss or damage to this property. Thus, the impound was necessary.

Thereafter, to protect themselves from possible claims for damage to the interior of the Stutz, it was reasonable for the police to remove the wet bag from the vehicle to protect the vehicle. In addition, it was reasonable to examine the inside of the bag to make sure there was nothing of value inside the bag which needed safekeeping and, if only perishables were inside such as fruit, to merely throw these items out.

The examination of the bag and its contents pursuant to the impound here was reasonable Fourth Amendment conduct under the facts of this case. (South Dakota v. Opperman, supra, 428 U.S. 364; see United States v. Matthews (10th Cir. 1980) 615 F.2d 1279, 1288.)

Furthermore, despite petitioner's assertions to the contrary, the police did not have to leave the car at the parking lot and simply lock it at his request. Petitioner was incoherent and there was no reason for the police to take his comments at face value. Moreover, since he had not proved he owned the vehicle, there was no reason for the police to listen to him and leave the car at the lot while the true owner might be looking for it. The more sensible approach was to impound the car until ownership could be determined.

In addition, it makes no sense for petitioner to claim the police should have left the car locked in the parking lot since persons had been milling about the car, there was danger vandals would destroy or strip the unusual car, someone might steal it, and petitioner was threatening to sue the police if the car

was touched by people in the shopping center. Under these facts, the police obviously had to impound the vehicle to protect the car, the interests of its true owner, the shopping center, and the interest of the police in avoiding a law suit because the car was damaged or stolen.

Accordingly, under the facts of this case, the police were not required to comply with petitioner's request the car be left locked in the parking lot. The police properly impounded the vehicle and examined the paper bag as part of a valid inventory of the contents of the impounded vehicle.

II

THE BAG WAS PROPERLY SEARCHED INCIDENT TO PETITIONER'S ARREST

In addition to the inventory and impound concepts discussed previously, it

is clear the bag could properly be searched incident to petitioner's arrest. Petitioner was arrested for being under the influence of drugs or alcohol in a public place. Incident to this arrest, the police had the right to search the passenger area of the vehicle, including any closed containers, because the lawful arrest justified an infringement of any privacy interest petitioner may have had. (New York v. Belton (1981) ___ U.S. ___ (69 L.Ed.2d 768).)

In Belton, passengers of a vehicle were removed from a vehicle, and were arrested for possession of marijuana. The passenger area of the vehicle was then searched revealing a black leather jacket belonging to Belton. Inside one of the jacket pockets, cocaine was found. This Court found this was a valid search incident to an arrest noting:

"When a person cannot know how a court will apply a settled principle to a recurring factual situation, that person cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority. While the Chimel case established that a search incident to an arrest may not stray beyond the area within the immediate control of the arrestee, courts have found no workable definition of 'the area within the immediate control of the arrestee' when that area arguably includes the interior of an automobile and the arrestee is its recent occupant. Our reading of the cases suggests the generalization that articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within 'the area into which an arrestee might reach in order to grab a weapon or evidentiary item.' Chimel, supra, at 763. In order to establish the workable rule this category of cases requires, we read Chimel's definition of the limits of the area that may be searched in light of that generalization. Accordingly, we hold that when a policeman has made a lawful custodial arrest

of the occupant of an automobile,[2] he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile.[3]

"It follows from this conclusion that the police may also examine the contents of any containers found within the passenger compartment, for if the passenger compartment is within reach of the arrestee, so also will containers in it be within his reach.[4] United States v. Robinson, supra; Draper v. United States, 358 U.S. 307. Such a container may, of course, be searched whether it is open or closed, since the justification for the search is not that the arrestee has no privacy interest in the container, but that the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have.

---

"2. The validity of the custodial arrest of Belton has not been questioned in this case. Cf. Gustafson v. Florida, 414 U.S. 260, 266 (concurring opinion).

"3. Our holding today does no more than determine the meaning of Chimel's principles in this particular and problematic content. It in no way alters the

> fundamental principles established in the Chimel case regarding the basic scope of searches indicent to lawful custodial arrests.
>
> "4. 'Container' here denotes any object capable of holding another object. It thus includes closed or open glove compartments, consoles, or other receptacles located anywhere within the passenger compartment, as well as luggage, boxes, bags, clothing, and the like. Our holding encompasses only the interior of the passenger compartment of an automobile and does not encompass the trunk." (New York v. Belton, supra, 69 L.Ed.2d at pp. 774-775.)

Thus, in accord with Belton, the police properly seized and searched the paper bag found in the passenger area of petitioner's vehicle incident to his arrest.

Petitioner, however, suggests Robbins v. California (1981) ___ U.S. ___ (69 L.Ed.2d 744) would invalidate the search of the bag here. This is simply not true. In Robbins, police searched a vehicle pursuant to the automobile exception to the

warrant requirement, and eventually searched the luggage compartment. Inside the compartment, they found a tote bag and two packages. Police unwrapped the packages and found marijuana.

Six justices of this Court concurred in the resulting invalidation of the search. Yet, only four justices signed a plurality opinion which indicates police may not search any closed container in an automobile being searched under the automobile exception to the warrant requirement unless the police have a search warrant for the closed container. (Robbins v. California, supra, 69 L.Ed.2d at p. 752.) The Chief Justice merely joined in the result while Justice Powell in a separate concurring opinion noted the right to privacy in a closed container depended on the nature of the container in each case. (Id.)

Robbins clearly is not controlling here for several reasons. First, the opinion was only a plurality opinion and thus is of limited precedential value. Second, the opinion discussed searching a closed item found in a luggage area, not a passenger area as in this case. Third, and perhaps of most import, the court expressly noted it was not discussing the scope of a search incident to an arrest. The only issue in Robbins was the scope of a search of a closed container during a search of a vehicle under the automobile exception to the warrant requirement. Thus, Robbins is inapposite here. (Robbins v. California, supra, 69 L.Ed.2d at p. 752, fn. 3, see too pp. 752-753, and fn. 2 (conc. opn. of Powell, J.).)

Furthermore, the continuing viability of Robbins is questionable anyway. This Court recently granted a petition for

writ of certiorari in United States v. Ross, No. 80-2209. The order granting the petition reads as follows:

> "80-2209. U.S. v. Ross. The motion of respondent for leave to proceed in forma pauperis is granted. The petition for writ of certiorari is granted. The parties are directed to address the question whether the Court should reconsider Robbins v. California, 453 U.S. ____ (1981)."

Thus, the search of the bag incident to petitioner's arrest was in accord with the dictates of New York v. Belton and was proper.

III

THE SEARCH OF THE CONTAINER WAS ALSO PROPER AS PETITIONER HAD NO EXPECTATION OF PRIVACY

Since the Robbins decision was only a plurality decision, it apparently does not foreclose examination in each case as to whether a closed container

inside a vehicle may be searched without a warrant when there is no expectation of privacy in the specific closed container.

Accordingly, since the instant case involved the examination of a paper bag, and the courts have held there is no expectation of privacy in a paper bag in a vehicle, the police could search the bag without any search warrant. (United States v. Mackey (9th Cir. 1980) 626 F.2d 684, 687; United States v. Honigman (9th Cir. 1980) 633 F.2d 1336.)

Thus, for this additional reason the search of the paper bag here was proper.

/

/

/

/

/

/

/

## CONCLUSION

For the foregoing reasons respondent respectfully requests the petition for writ of certiorari be denied.

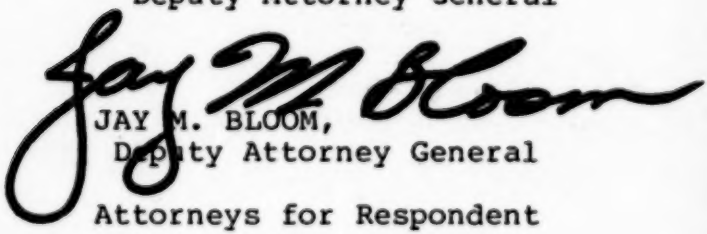
Respectfully submitted,

GEORGE DEUKMEJIAN,
Attorney General

ROBERT H. PHILIBOSIAN,
Chief Assistant
Attorney General--
Criminal Division

DANIEL J. KREMER,
Assistant Attorney
General

STEVEN V. ADLER,
Deputy Attorney General



JAY M. BLOOM,
Deputy Attorney General

Attorneys for Respondent

# APPENDIX A

[Filed May 14, 1981]

NOT TO BE PUBLISHED IN
OFFICIAL REPORTS

COURT OF APPEAL, FOURTH DISTRICT

SECOND DIVISION

STATE OF CALIFORNIA

| | | |
|---|---|---|
| PEOPLE OF THE STATE OF CALIFORNIA,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>ALEXANDER KULIK,<br><br>Defendant and Appellant. | ) | 4 Crim. No. 10520<br><br>(Super. Ct. No. C39308)<br><br>O P I N I O N |

APPEAL from a judgment of the Superior Court of Orange County. Paul Mast, Judge.* Affirmed.

Philip A. DeMassa, for Defendant and Appellant.

---

*Assigned by Chairperson of the Judicial Council.

George Deukmejian, Attorney General, Jay M. Bloom and A. Wells Petersen, Deputy Attorneys General, for Plaintiff and Respondent.

By information defendant was charged with transportation of heroin (Health & Saf. Code, § 11352) in count 1, and with possession of heroin for sale (Health & Saf. Code, § 11351) in count 2. The jury found defendant guilty of count 1 and could not reach a verdict on count 2. The court declared a mistrial on count 2 and later dismissed it. Defendant appealed from the judgment of conviction under count 1, transportation of heroin.

Defendant contends: (1) the trial court used an improper standard in ruling on the pretrial motions to suppress; (2) there was

insufficient probable cause for his arrest; (3) the entry into the vehicle and later search of the shopping bag were unlawful; (4) the search warrant for the vehicle was invalid as the fruit of the poisonous tree; (5) the search warrants for the Newport Beach residence, the motorhome, and the Leucadia residence were issued without probable cause; (6) the trial court erred in failing to instruct the jury on a lesser included offense, i.e., possession of heroin as a lesser included offense of possession of heroin for sale; and (7) the trial court erred in using the same facts for imposition of the upper term and for imposition of consecutive terms.

## FACTS

Evidence presented at the pretrial hearing on the Penal Code section 1538.5 motion to suppress

established that at 12:50 p.m. on October 22, 1977, Orange County Deputy Sheriff Robert Giles was dispatched via his patrol unit's radio to a Safeway supermarket in Mission Viejo to look for a drunk in a Stutz Blackhawk sedan.

When Deputy Giles arrived on the scene, he observed a Stutz Blackhawk sedan parked in a marked parking space in the center of the lot adjacent to the Safeway and several small businesses. He pulled up behind the vehicle and parked.

As Deputy Giles walked to the driver's side of the Stutz, he observed defendant seated in the driver's seat with his head on the steering wheel. When Deputy Giles tapped several times on the closed window with his knuckles, defendant sat upright and looked about

for several seconds. Defendant's hair was disheveled and his clothes were wrinkled.

Deputy Giles tapped on the window again and told defendant to roll it down. Defendant turned around, looked toward the officer, and complied with his request. Deputy Giles observed that defendant was sweating heavily and he had a brown substance smeared around his mouth. He smelled of a musty odor. When Deputy Giles asked defendant if he were all right, defendant replied that he was. Defendant's hands were on the steering wheel and Deputy Giles observed there was a dark or dirty substance underneath his finger nails and around the cuticle of those finger nails.

Deputy Giles asked defendant for identification. Defendant opened a wallet, looked through it, closed it up

and stated he did not have any. The deputy had observed papers in the wallet. When asked if he had a driver's license, defendant took a piece of paper he identified as his birth certificate out of the wallet and handed it to Deputy Giles. This paper was a Nevada birth certificate for an Anthony William Kaiser, born March 21, 1950.

After Deputy Giles had asked defendant if he were Anthony Kaiser and received an affirmative response, the officer asked defendant for his birth-date and his age. Defendant stated he was born on March 27, 1947, and was 27 years old. He hesitated a moment and then said he was 29.

Deputy Giles asked defendant for the Stutz' registration or other proof of ownership. Defendant replied that he did not have any because it was

a leased car. Deputy Giles testified that defendant spoke very slowly, that his speech was slurred and that he would begin to answer questions in a normal tone of voice and then trail off until he could barely be heard. When defendant looked at Deputy Giles and tried to concentrate, his eyes would close.

Deputy Giles asked defendant to get out of the Stutz because Giles suspected defendant was under the influence. When he complied, defendant hit the front door post with his right foot. Defendant swayed and leaned against the Stutz. Defendant did not smell of alcohol.

In response to Deputy Giles' question as to the day of the week, defendant stated it was Friday. It was actually Saturday. He asked defendant

where he was going and defendant responded, "Kansas."

Defendant was arrested for being drunk in a public place in violation of Penal Code § 647, subdivision (f), and escorted to the rear seat of the patrol unit. Defendant swayed as he was physically escorted by Deputy Giles to the patrol unit. There was a noticeable tremor in defendant's hands, and he was pale.

A back-up officer, Deputy Essoe, arrived, and Deputy Giles told him that defendant was in custody for being under the influence and that he had been giving erroneous information. Both officers proceeded to speak with defendant.

In response to Deputy Giles' questioning, defendant stated that his name was Anthony Kaiser, that he was a produce distributor, and that the Stutz

belonged to a Rick Willis. Deputy Giles asked defendant for a telephone number for Willis and asked if Willis would be able to come down and show proof of ownership of the Stutz. Defendant gave a telephone number, but stated Willis had left for Hawaii that morning and suggested that Deputy Giles contact Delphi Auto Design because someone there would be able to identify defendant and confirm the fact that Willis had given defendant the car that morning.

When asked to identify Delphi Auto Design, defendant stated it was a business in which he and Willis were partners. Deputy Giles then stated to defendant that he, Giles, thought defendant had said he was a produce distributor. Defendant failed to respond to the implied inconsistency. When asked where his business was

located and for a telephone number, defendant stated it was located in either Newport Beach or Costa Mesa and that he did not know either the street or the telephone number.

Deputy Essoe contacted the desk through the dispatcher to attempt to locate Delphi Auto Design. Deputy Giles testified he did not hear a response from the desk and could not recall if he was informed of a response by Deputy Essoe.

When Deputy Giles advised defendant of all the inconsistencies in the information he had provided and asked him for his true identity, defendant stated: (1) his real name was Alex Kulik; (2) he had obtained the false social security and Blue Cross identification cards and the false identification for $100; and (3) he did not have any verification of his

identification on him. In response to further questioning, defendant stated he once had a California driver's license but had let it expire in 1972. The dispatcher was asked to verify this statement.

Defendant stated he wanted the Stutz locked and left where it was parked. Deputy Giles had received information from the dispatcher that the car was not wanted. People walking by and standing around were clearly curious and were looking at the Stutz. Defendant started to yell at Deputy Giles to get the people away from the Stutz or he would sue.

Deputy Giles testified he did not know who the owner of the Stutz was and decided to store the Stutz for its safety. He contacted a sergeant for a flatbed truck because he did not want a

tow truck hooking up to the vehicle. Sergeant Voltin responded to the scene and concurred that the Stutz should be stored.

Deputy Giles then observed and seized a metal spoon with a darkened bottom which he testified was in plain view on the right front passenger seat. The officer then looked into the Stutz' glove compartment in an unsuccessful attempt to find its registration. As of that moment, the ownership of the Stutz was very much in question.

When Deputy Giles looked into the Stutz he otherwise observed a brown paper shopping bag of fruit on the floor-board directly behind the driver's seat. The bottom of the bag had turned a dark brown and it appeared to be wet. He saw an overripe banana that was beginning to

ooze and relatively fresh lemons, limes, avocados and onions in the bag. He testified that the jail had a policy of not accepting perishable items for suspects in custody.

As a consequence, Deputy Giles reached into the Stutz and picked up the bag. He intended to discard it so it would not cause any damage to the interior. As he carried it to a planting area located a short distance away, he felt a hard cylindrical object near the bottom of the bag. When Deputy Giles reached the planting area, he reached into the bag to see what the object was and removed it. He discovered a quart jar filled with a white powdery substance later determined to be heroin. The lid was sealed with a silver colored tape. He then removed a second jar from the sack.

The jars and the bag of fruit were put in the patrol vehicle's trunk. They were transported to the narcotics room at the sheriff's substation where the wet portion of the bag gave way and the fruit rolled out onto the floor. It was discovered at that time that in the bag there was a third jar wrapped in tissue paper.

A search of defendant incident to his arrest and before he was removed from the scene revealed that his trousers were wet and yielded: (1) two green pills, which defendant stated were his wife's tranquilizers; (2) a wallet; (3) an identification; (4) 57 one hundred bills; and (5) $29 in other currency.

Deputy Giles testified that the maximum bail for drunk on drugs and giving false information to an officer would have been about $500. He also testified that

defendant would have been through the booking process normally in six to eight hours if he were sober enough to be booked.

Defendant slept in the back seat of the patrol vehicle while being driven to the police station.

STANDARD OF REVIEW

Initially, defendant contends that the trial court which heard the motion to suppress made a fundamental error concerning the underlying rationale for the exclusionary rule and its application in criminal cases and, as a result, that it applied an improper standard of review, i.e. the public's right to a trial on the merits regardless of the legality of police conduct.

Defendant cites in support of this contention the trial court's comments, as follows:

"In this case it appears to the Court that the police and District Attorney's office worked long and hard hours on an extremely complicated case. This is not a case for penalizing the police for unlawful police conduct. To the extent that the cases relate to deterring unlawful police conduct in terms of punishing the police, it always appeared to me that when we talk about punishing the constable for blundering, that we're not really punishing the authorities. We really punish society by not having a trial on the merits of guilt or innocence.

"This is by no means saying that this Court is ignoring the mandates of our state and Federal Constitutions and the appeallate [sic] cases interpreting them. Our constitutions and cases speak of unreasonable searches and

seizures and with that I am trying to deal."

These remarks are merely a statement of the court's personal beliefs concerning the exclusionary rule and a comment on the lack of police culpability. It does not follow from these beliefs that the court used an improper standard.

It is clear from an examination of the reporter's transcript of the court's oral findings that they are all supported by substantial evidence. This is what we measure in our review. (People v. Lawler, 9 Cal.3d 156, 160.) The court was only commenting on the overall case in light of the appropriate standard which it used in considering the evidence.

LEGALITY OF ARREST

Defendant contends there was insufficient probable cause for his arrest for violating Penal Code section 647,

subdivision (f). He argues that no evidence was presented to show that Deputy Giles was qualified to detect whether defendant was intoxicated. He contends further that Deputy Giles did not observe anything to indicate that defendant was intoxicated.

Deputy Giles testified that he had been a peace officer for five years, the last two and one half of which he had been a patrolman. He testified further that he had made at least 100 arrests of persons who were under the influence of alcohol and 25 or so arrests of persons who were under the influence of other intoxicants.

Although he stated he had formed an opinion as to whether defendant was intoxicated, Deputy Giles was never asked to state his opinion.

The trial court found that there was probable cause to arrest defendant. This finding is supported by substantial evidence. The trial court noted that Deputy Giles had observed defendant was swaying, his eyes kept closing, he had wet his pants, his hair was disheveled, and he thought it was a different day of the week than it was. We also note that Deputy Giles testified defendant's speech was slow and slurred, he was sweating, there was a noticeable tremor in his hands, he was pale, he had difficulty getting out of the Stutz, and he leaned against the Stutz for support.

Deputy Giles had had enough expertise to determine that defendant was under the influence of drugs. Therefore, he had probable cause to arrest defendant for violating Penal Code section 647, subdivision (f).

SEIZURE OF HEROIN FILLED JARS

Defendant contends the heroin in the quart jars was unlawfully seized on the following theories: (1) the search of the Stutz and the grocery bag were not lawful under the emergency exception to the search warrant requirement; (2) the search was not a valid inventory search; (3) there was no authority in the Vehicle Code for removing the Stutz from private property; and (4) the search of the closed paper bag was improper.

We hold, on the basis of the facts recited above, that Deputy Giles did not search the Stutz and, consequently, the emergency exception and the rules governing inventory searches are inapplicable in this case.

Wehn Deputy Giles decided to store the Stutz Black hawk sedan for its

own safety, he was engaged in one of the primary duties of a police officer, the protection of property. (See People v. Parra, 30 Cal.App.3d 729, 732-733.) The trial court found that the deputy acted reasonably in deciding to impound the Stutz. This finding is supported by substantial evidence. The Stutz was on private property in the parking lot of a shopping center. There were curious bystanders, including children, gathered at the scene looking at the vehicle, which was a unique, attention grabbing, expensive vehicle. Although defendant possessed enough money to post bail, it was not clear at the time the decision to impound was made whether he would be released on bail and thus be able to return to the Stutz within the six to eight hour minimum period. A doubt also remained as to who actually owned the Stutz.

Even though defendant asked Deputy Giles to secure and leave the Stutz where it was parked, the officer acted reasonably in not acceding to this request. Initially, it was unclear to the officer whether defendant was sufficiently sober and rational to make such a request. Furthermore, the trial court's finding that the officer's belief that the ownership and legal possession of the Stutz were in question and that it might have been stolen, even though not reported as such, was supported by substantial evidence. Defendant had failed to produce the automobile's registration and he had failed to substantiate his statement that the Stutz had been leased and had been turned over to him to drive that morning.

Once the officer decided to safeguard the Stutz by impounding it, he acted reasonably in removing the wet grocery bag that appeared to be filled

with overripe fruit, this in order to keep the rear seat floor covering from being damaged. When he felt the hard cylindrical object in the bag while he was carrying it to an adjacent area to be discarded, he had a duty to determine the identity of that object to determine whether the preserve it or discard it also.

The discovery of the heroin filled jars was not the result of an illegal search or any unlawful conduct by Deputy Giles who was merely engaged in conduct which he reasonably believed was necessary to preserve and protect an expensive automobile.

SEARCH WARRANT FOR STUTZ

The affidavit supporting the search warrant for the Stutz was based upon evidence seized from defendant when he was arrested. Defendant's only objection to the legality of the search of the

Stutz is based on his contention that the initial discovery of the heroin filled jars was unlawful and that anything that flowed from that discovery is fruit of the poisonous tree and must be suppressed.

There is no merit in this contention. We have held that the heroin filled jars were lawfully discovered and seized.

OTHER SEARCH WARRANTS

Defendant contends there was insufficient probable cause for the issuance of the search warrants for the Newport Beach residence, the motorhome and the Leucadia residence.

We need not determine whether these search warrants were valid, because the only evidence seized when they were executed was admitted only to prove count 2. That count has been dismissed by the trial court.

LESSER INCLUDED OFFENSE

As his sixth assignment of error defendant argues that the trial court erred in failing sua sponte to instruct the jury on possession of heroin as a lesser included offense. Included within what? A fair reading of the defendant's brief suggests that this contention was made with reference to the possession for sale count. However, that count was dismissed because the jury had hung up on it, and so it could reasonably be observed that any error here assigned is now moot. Nevertheless, at oral argument, it came out unequivocally that the claimed error was still being pursued as to count 1, transportation of heroin.

The trial court must instruct the jury sua sponte on lesser included offenses when the evidence raises a question as to whether all of the elements

of the charged offense were present. (People v. Sedeno, 10 Cal.3d 703, 715-716, revd. on other grounds, People v. Flannel, 25 Cal.3d 668, 684, fn. 12.)

The point to be resolved then is whether the evidence justified the sua sponte instruction. It is clear that it did not. Here it should be noted that the defense to count 1 was not that defendant had merely possessed the heroin. The defense was that defendant had borrowed the Stutz not knowing that heroin was in it. Never was it defendant's theory that someone else had driven the Stutz to the Safeway parking lot and then detailed defendant to keep watch over the contraband.

Thus, transportation was never disputed, only whether defendant knew the contraband was present in the Stutz. Accordingly, it was up to the jury to

decide whether defendant knew of the heroin and realized its nature as a controlled substance. On this issue the jury was instructed.

It was the defendant's knowledge of the presence of the heroin which was the key issue of fact as to count 1. Because there was no element of transportation in question which would have supported a possession conviction rather than a transportation conviction, the defendant faced being found guilty of the greater offense or nothing. In other words, if the jury had believed defendant, they could not have convicted him either of transportation or possession.

Under such circumstances as here obtained, there was no need or purpose for giving included offense instructions.

(People v. Sedeno, supra, 10 Cal.3d 703, 715.) In other words, possession is not invariably or necessarily a lesser included offense of transportation. (People v. Rogers, 5 Cal.3d 129, 134.) Based upon the foregoing, we hold that it was not error to fail sua sponte to instruct the jury on the offense of possession.

PROPRIETY OF SENTENCING

Finally, defendant contends the trial court improperly considered the same circumstances, the fact the crime involved a large quantity of heroin and the fact defendant had a prior 1969 related marijuana conviction, to impose the upper term and to impose consecutive sentences, which, according to defendant, was in violation of California Rules of Court, rule 441, subdivision (c).

The trial court sentenced defendant to the five year upper term for transportation of heroin and made this sentence consecutive to a previously imposed federal sentence.

While it appears from the reporter's transcript that the trial court initially indicated these two facts would be the basis for imposing both the upper term and the consecutive sentence, the court did not do so after being reminded by counsel that different facts must be used for aggravation and consecutive sentencing.

The trial court correctly relied on the fact the crime involved a large amount of contraband (Calif. Rules of Court, rule 421, subd. (a) (11)) to impose the upper term. The court then relied on the fact that defendant had served a prior prison sentence (Calif.

Rules of Court, rule 425, subd. (b), rule 421, subd. (b) (3)) to impose a consecutive sentence.

The judgment is affirmed.

/s/ McDaniel
J.

We concur:

/s/ Kaufman
Acting P.J.

/s/ Goldstein
J.*

*Assigned by the Chairperson of the Judicial Council.

# APPENDIX B

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

AUG 6 1951

*I have this day filed Order*

HEARING DENIED DOCKET

NO. 8 Crim. 237

Entered

Date Filed 8-10-51

*In re:* 4/cr. *No.* 10520

Peo

*vs.*

Kulik

*Respectfully,*

*Clerk*

DEP

# APPENDIX C

CALIFORNIA STATUTES

Health and Safety Code
Sections

§ 11351.

Except as otherwise provided in this division, every person who possesses for sale (1) any controlled substance specified in subdivision (b) or (c) of Section 11054, specified in paragraph (11), (12), or (17) of subdivision (d) of Section 11054, or specified in subdivision (b) or (c) of Section 11055, or (2) any controlled substance classified in Schedule III, IV, or V which is a narcotic drug, shall be punished by imprisonment in the state prison for two, three, or four years.

§ 11352.

Except as otherwise provided in this division, every person who

transports, imports into this state, sells, furnishes, administers, or gives away, or offers to transport, import into this state, sell, furnish, administer, or give away, or attempts to import into this state or transport (1) any controlled substance specified in subdivision (b) or (c) of Section 11054, specified in paragraph (11), (12), or (17) of subdivision (d) of Section 11054, or specified in subdivision (b) or (c) of Section 11055, or (2) any controlled substance classified in Schedule III, IV, or V which is a narcotic drug, unless upon the written prescription of a physician, dentist, podiatrist, or veterinarian licensed to practice in this state, shall be punished by imprisonment in the state prison for three, four, or five years.

Penal Code Sections

§ 647.

Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor:

(f) Who is found in any public place under the influence of intoxicating liquor, any drug, toluene, any substance defined as a poison in Schedule D of Section 4160 of the Business and Professions Code, or any combination of any intoxicating liquor, drug, toluene, or any such poison, in such a condition that he is unable to exercise care for his own safety or the safety of others, or by reason of his being under the influence of intoxicating liquor, any drug, toluene, any substance defined as a poison in Schedule D of Section 4160 of the Business and Professions Code, or any

combination of any intoxicating liquor, drug, toluene, or any such poison, interferes with or obstructs or prevents the free use of any street, sidewalk, or other public way.

§ 1538.5.

(a) A defendant may move for the return of property or to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure on either of the following grounds:

(1) The search or seizure without a warrant was unreasonable.

(2) The search or seizure with a warrant was unreasonble because (i) the warrant is insufficient on its face; (ii) the property or evidence obtained is not that described in the warrant; (iii) there was not probable cause for

the issuance of the warrant; (iv) the method of execution of the warrant violated federal or state constitutional standards; (v) there was any other violation of federal or state constitutional standards.